A

AZIZI AMRAN

v.

HIZZAM CHE HASSAN

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
MOHD GHAZALI YUSOFF JCA
ZULKEFLI MAKINUDIN JCA
[CIVIL APPEAL NO: P-04-72-2003]

C

24 APRIL 2006

DAMAGES: *Personal injuries - Leg fracture and shortening - Quantum of damages - Egg-shell skull rule - Whether effect of previous injuries can be taken into consideration in assessing damages*

D

DAMAGES: *Quantum - Assessment - Loss of future earnings and loss of earning capacity - Onset of osteoarthritis - Real or substantial risk that plaintiff will lose present employment before end of working life*

The plaintiff had suffered a closed supracondylar fracture of left
E femur with comminution and a closed fracture mid-shaft of left tibia. There was also an old fracture of upper 1/3 left tibia. The plaintiff walked with a limping gait but was able to walk unaided. There was a shortening of the left leg and wasting of the muscles of the left leg with scars and swelling. The medical report showed
F that inevitably he would gradually develop osteoarthritis of the knee joint. The orthopedic specialist's report also indicated that about 1.5 to 2cm of the shortening was due to the old fracture and that the present accident had left the plaintiff with a shortening of 2 to 2.5cm.

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At the Sessions Court the plaintiff was awarded RM28,000 for pain and suffering. No award was made for loss of earning capacity. On an appeal by the plaintiff in respect of quantum, the High Court affirmed the award of damages made by the Sessions
H Court and dismissed the plaintiff's appeal. The learned High Court Judge was of the view that since the actual shortening attributed to the present accident was only 2 to 2.5cm, this was the damage that the present defendant was liable for. The plaintiff had already made a claim for the previous 2cm shortening through another
I counsel in an earlier civil suit filed. The plaintiff appealed against the decision of the learned High Court Judge.

Held (allowing the plaintiff's appeal)
Per Zulkefli Makinudin JCA:

(1) The award for pain and suffering should be on the basis of 4.0cm shortening with a slight scaling down for compensation the plaintiff received in the first accident. The defendant must take his victim as he finds him. This is the egg-shell skull rule. The learned judge was wrong when he refused to take the present disabilities including the previous injuries into consideration in deciding whether to enhance the award made by the learned Sessions Court Judge. (paras 9 & 10)

(2) The award of RM28,000 for pain and suffering in the circumstances of this case was not only manifestly low but way off the mark and out of the trend with comparable injuries. The plaintiff should be entitled to an award of RM45,000 with a deduction of RM10,000 for the previous injuries sustained by the plaintiff. (paras 11 & 19)

(3) The plaintiff must show real or substantial risk and not merely a fanciful risk that he will lose his present employment at some time before the estimated end of his working life in order for him to raise the claim of loss of earning capacity. In the present case, if the plaintiff were to lose his present employment it would be difficult for him with the onset of osteoarthritis to get a similar job or a job with the same salary and this was not a fanciful risk. (para 24)

(4) This was a fit and proper case for loss of earning capacity to be awarded to the plaintiff. An award of RM15,000 was made to the plaintiff having regard to the nature of the plaintiff's work, the age of the plaintiff at the time of the accident and the likelihood that it would be difficult for him to get a similar job or a job with the same salary at some time before the estimated end of his working life. (para 25)

Bahasa Malaysia *translation of headnotes*

Plaintif telah mengalami kecederaan "closed supracondylar fracture" femur kanan dengan "comminution and closed fracture mid-shaft" tibia kiri. Juga terdapat satu "fracture of upper 1/3" tibia kiri yang lama. Plaintif dapat berjalan tanpa bantuan tetapi dia berjalan dengan "limping gait". Terdapat pemendekkan kaki kiri dan "wasting of the muscles" pada kaki kiri dengan parut dan bengkak-bengkak. Laporan perubatan menunjukkan bahawa sudah tentu dia

akan perlahan-lahan mengalami osteoarthritis pada sendi lututnya. Laporan pakar otopedik juga menunjukkan bahawa lebih kurang 1.5 hingga 2sm pemendekkan itu adalah akibat patahan yang lama dan kemalangan yang baru-baru ini telah meninggalkan plaintif dengan pemendekkan sebanyak 2 hingga 2.5sm.

Di Mahkamah Sesyen, plaintif telah diawardkan RM28,000 untuk kesakitan dan kesengsaraan. Tiada award dibuat untuk kehilangan kapasiti mendapat mata pencarian. Atas rayuan oleh plaintif berkenaan dengan kuantum, Mahkamah Tinggi telah mengesahkan award gantirugi yang dibuat oleh Mahkamah Sesyen dan telah menolak rayuan plaintif. Hakim Mahkamah Tinggi yang bijaksana telah berpendapat yang oleh kerana pemendekkan yang sebenarnya yang boleh dikaitkan kepada kemalangan yang baru-baru ini adalah hanya 2 hingga 2.5sm, inilah kerugian yang defendan di sini bertanggungjawab untuk. Plaintif telahpun membuat satu tuntutan untuk pemendekkan sebanyak 2sm yang terdahulu itu melalui peguam lain dalam satu tindakan sivil yang telah difailkan sebelum dari ini. Plaintif telah merayu terhadap keputusan Hakim Mahkamah Tinggi yang bijaksana.

Diputuskan (membenarkan rayuan plaintif)
Oleh Zulkefli Makinudin HMR:

(1) Award untuk kesakitan dan kesengsaraan mestilah berdasarkan pemendekkan sebanyak 4.0sm dengan sedikit pengurangan untuk mengambilkira pampasan yang telah diterima oleh plaintif dalam kemalangan pertama itu. Defendan mesti mengambil mangsanya sepertimana yang dijumpainya. Inilah rukun "egg-shell skull". Hakim yang bijaksana telah khilaf apabila beliau enggan mengambilkira kecacatan-kecacatan semasa itu serta kecederaan-kecederaan lama dalam memutuskan sama ada meningkatkan award yang dibuat oleh Hakim Mahkamah Sesyen yang bijaksana itu.

(2) Award sebanyak RM28,000 untuk kesakitan dan kesengsaraan dalam keadaan kes ini bukan sahaja terlalu rendah malah jauh daripada kebiasaannya dan terkeluar daripada arah haluan kecederaan-kecederaan bandingan. Plaintiff sepatutnya berhak menerima award sebanyak RM45,000 dengan pengurangan sebanyak RM10,000 untuk kecederaan-kecederaan lama yang telah dialami oleh plaintif.

(3) Plaintif mesti menunjukkan risiko yang sebenar dan teguh dan bukan risiko yang hanya bersifat khayalan bahawa dia akan kehilangan pekerjaan semasanya pada suatu masa sebelum tamatnya riwayat kerja biasanya yang dijangkakan untuk membolehkannya menuntut untuk kehilangan kapasiti mendapat mata pencarian. Dalam kes ini, sekiranya plaintif kehilangan pekerjaan semasanya, akan menjadi sukar untuknya dengan permulaan serangan osteoarthritis untuk mendapatkan pekerjaan serupa atau pekerjaan dengan gaji yang serupa dan ini bukanlah satu risiko yang bersifat khayalan.

(4) Ini adalah satu kes yang sesuai dan tepat untuk kehilangan kapasiti mendapat mata pencarian diawardkan kepada plaintif. Satu award sebanyak RM15,000 telah diberikan kepada plaintif dengan mengambilkira jenis pekerjaan plaintif, umur plaintif pada masa kemalangan dan kebarangkalian kesukaran untuknya mendapat pekerjaan yang serupa atau pekerjaan dengan gaji yang serupa pada mana-mana masa sebelum tamatnya riwayat kerja biasanya yang dijangkakan.

Case(s) referred to:

Azman Kasri v. Md Isa Endut & Govt of Malaysia [1988] 2 CLJ 743; [1988] 1 CLJ (Rep) 351 HC ***(refd)***

Balakrishnan Kunjamboo Nair v. Savastine Anthony Francis [1991] 1 CLJ 503; [1991] 2 CLJ 327 HC ***(refd)***

Juminah Tongkon & Anor v. Yim Kam Cheng & Anor [1991] Mallal's Digest Para 990 ***(refd)***

Leong Yee Hoong v. Amuthamulan Shanmugam & Anor [2003] 3 MLJ (xii) ***(refd)***

Mazlan Abu Bakar v. Hoh Kai Cheong [1999] Mallal's Digest para 1225 ***(refd)***

Mustapha Kassim & Anor v. Md Akhir Ariffin [2003] 3 MLJ (x) ***(refd)***

Othman Ahmad v. Singapore Tractor Co Ltd [1966] 1 MLJ 64 ***(refd)***

Watts v. Rake [1960] 108 CLR 158 ***(refd)***

Yee Yat Wah lwn. Hoo Wong & Anor & Shim Chin Tong (Pihak Tiga) [1994] CLJ 414 HC ***(refd)***

For the appellant - Brijnandan Singh Bhar (Shailender Bhar with him); M/s Brijnandan Singh Bhar & Co

For the respondent - J Theeba Jothi; M/s Kumar & Co

[Appeal from High Court, Pulau Pinang; Civil Appeal No: 12-76-1999]

Reported by Amutha Suppayah

A

JUDGMENT

Zulkefli Makinudin JCA:

[1] This is an appeal by the plaintiff against the decision of the learned judge of the High Court at Penang who on an appeal by the plaintiff in respect of quantum only had affirmed the award of damages made by the learned judge of the Sessions Court and dismissed the plaintiff's appeal. At the Sessions Court the defendant had been found totally liable for the accident.

[2] Mr. Brijnandan Singh Bhar, learned counsel for the plaintiff before the High Court on appeal and again before us had argued on two main grounds as follows:

(a) that the award for pain and suffering amounting to RM28,000 was manifestly low.

(b) that there should have been an award for loss of earning capacity.

Pain And Suffering

[3] In the first medical report produced for the plaintiff it is stated that as of the date of accident that is 7 April 1996, the plaintiff was in hospital for 18 days. The injuries were as follows:

(1) Closed supracondylar fracture of left femur with comminution;

(2) Closed fracture mid-shaft of left tibia;

(3) Old fracture of upper 1/3 left tibia.

Management:

(1) Plating of left femur with bone grafting done under spinal anesthesia after 16 days of admission to hospital;

(2) Fracture of left tibia was managed conservatively.

[4] The plaintiff also produced the medical report of the orthopedic specialist who examined the plaintiff on 18 July 1997 and the findings of the specialist were:

(1) Although walked with a limping gait, able to walk unaided;

(2) Left leg was 4cm shorter than the right;

(3) Thigh girths when measured 10cm from the upper poles of the knee caps showed the right to be 43cm and the left 40 1/2cm indicating wasting of the muscles of the left leg.

(4) Scars:

(a) 23cm long scar over the lateral aspect of the left lower thigh;

(b) 7cm bone graft donor scar over the anterior aspect of the right iliac crest.

(5) Swelling around the knee joint with bow legged deformity of 10° of the knee joint with a range of movements of flexion being 0°-80° (Normal: 0°-150°).

(6) Whilst he was able to stand on one leg he was unable to squat.

(7) The fracture of the femur has united with angulation and the shortening. There is a plate and screws across the fracture site.

(8) The cost of removal of the plate and screws with hospitalization will be RM3,000.

(9) Inevitable that he would gradually develop osteoarthritis of the knee joint.

[5] Subsequent to the above earlier report, the same orthopedic specialist gave another report about a year later wherein he confirmed that about 1.5 to 2cm of the shortening was due to the old fracture. The said orthopedic specialist opinioned that the accident in question had left the plaintiff with a shortening of 2 to 2.5cm.

[6] At the trial before the Sessions Court, the learned Sessions Court Judge made the award of damage for pain and suffering as follows:

(1)	closed supracondylar fracture of the left femur with comminution	)
(2)	closed fracture of the mid shaft of the left tibia with 4cm shortening	) RM25,000

A (3) 23cm scar over the lateral aspect of the left lower thigh) RM 3,000

RM28,000

B **[7]** In the Sessions Court, learned counsel for the plaintiff submitted for an award of RM50,000 for pain and suffering without citing any authorities. The learned Sessions Court Judge relied on the case of *Balakrishnan s/o Kunjamboo Nair v. Savastine Anthony s/o Francis* [1991] 1 CLJ 503; [1991] 2 CLJ (Rep) 327 C wherein for a fracture of the femur with 4cm shortening the court had awarded RM20,000.

[8] Before the learned judge of the High Court and before us in this appeal, Mr. Brijnandan submitted that the court must D accept the man as he is, that is, that he is suffering from 4cm shortening of the left leg and that the court ought to make an award on that basis. However, the learned judge found that it was not a fair submission to make and went on to state that a tort-feasor is only liable for the actual and related consequential E suffering occasion to the plaintiff as a direct result of the tort-feasor's negligence. The actual shortening attributed to the subsequent accident is 2 to 2.5cm shortening and the learned judge was of the view that this is the damage that the present defendant is liable for. In this case there was evidence led that F the plaintiff had already made a claim for the previous 2cm shortening through another counsel in an earlier civil suit filed. For this reason the learned judge of the High Court found that the plaintiff's request to treat this case like the egg-shell cases is totally out of line as the plaintiff cannot be allowed to enrich himself G twice over the same injury.

[9] The issue that arises in this appeal is whether the court should have considered an award based on 2.5cm or on 4.0cm shortening of the left leg. It is not disputed in this case that the H plaintiff has been compensated for the first accident. It is our considered view that the award should be on the basis of 4.0cm shortening with a slight scaling down for compensation the plaintiff received in the first accident. In this regard we would agree with the submission of learned counsel for the plaintiff that the I defendant must take his victim as he finds him. This is the egg-shell skull rule. On this point in the case of *Watts v. Rake* [1960] 108 CLR 158, Dixon CJ at p. 160 had this to say:

> If the injury proves more serious in its incidents and its consequences because of the injured man's condition, that does nothing but increase the damages the defendant must pay. To sever the remaining leg of a one-legged man or put out the eye of a one-eyed man is to do a far more serious injury than it would have been had the injured man possessed two legs or two eyes. But for the seriousness of the injury the defendant must pay." In the same case Menzies J at page 164 stated as follows: "A negligent defendant must take his victim as he finds him and pay damages accordingly. The fact that the person injured was peculiarly susceptible to ensuing complications that would not in a normal person have followed from the injuries received, or that the person injured already had a disability which made the injury the more disabling – eg, the loss of an only eye – does not mean that damages are not to be assessed according to the circumstances of the particular case." Still, on the same point in the case of *Hughes v. Lord Advocate* [1963] AC 837 (HL) at page 845 Lord Reid in his speech *inter alia* said: "A defendant is liable, although the damage may be a good deal greater in extent than was foreseeable. He can only escape liability if the damage can be regarded as differing in kind from what was foreseeable."

[10] With respect to the findings of the learned judge it would appear that his findings are clearly against the principle as set out in the above cited case authorities. His lordship erred in not taking into consideration the effect of the present overall disability of 4cm suffered by the plaintiff. Prior to this accident the plaintiff had a shortening of 1.5 to 2.0cm. However this did not disable him for he kept working. The plaintiff only received crippling disabilities in the present accident. We are of the view that the learned judge of the High Court was therefore wrong when he refused to take the present disabilities including the previous injuries into consideration in deciding whether to enhance the award made by the learned trial Sessions Court Judge.

[11] The next question to be considered is whether the award of RM28,000 for pain and suffering in the circumstances of this case is manifestly low. We find that this figure is not only manifestly low but way off the mark and out of the trend with comparable injuries. We shall proceed to show why this award of RM28,000 is manifestly low as follows:

[12] In the case of *Juminah bt. Tongkon & Anor. v. Yim Kam Cheng & Anor.* [1991] Mallal's Digest para 990 at p. 294 for a fracture of left femur and left tibia with 3cm shortening of the leg the High Court in 1991 awarded RM40,000. There was no other

A disability. In the case of *Yee Yat Wah lwn. Hoo Wong & Anor & Shim Chin Tong (Pihak Tiga)* [1994] CLJ 414 for fracture of the tibia with no disabilities whatsoever the High Court awarded RM10,000. For facture of the left femur with 0.5cm (1/2cm) which affected his walk and muscle wasting the court in 1994
B awarded RM16,000. For scars an award of RM12,000 was made.

[13] In 1966 the Federal Court in the case of *Othman bin Ahmad v. Singapore Tractor Co. Ltd.* [1966] 1 MLJ 64 for the injuries sustained by the plaintiff, the court awarded RM20,000. This was
C some 38 years before our present case. In *Othman*'s case the injuries were as follows:

(1) that the plaintiff walked with a marked limp and was not able to run;

D (2) that squatting was difficult;

(3) that the fractures had united but there was about 3/4" to 1" of shortening in the left leg. 1 1/2" of wasting in the left calf and 3/4" of wasting in the left thigh;

E (4) that the left hip and knee was normal;

(5) that at the left ankle there was a mild equines deformity and a slight deformity in the foot;

F (6) that there was marked scarring over the front of the ankle and foot;

(7) that movements at the ankle were painful and limited;

(8) that movements at the joints in the foot were markedly
G restricted and painful; and

(9) that there was about 80% loss in movements in these joints.

The Federal Court then found the award of RM10,000 for pain and suffering and loss of amenities was too low and was so much
H out of line with the discernable trend or pattern of awards in reasonably comparable cases that it must be regarded as having been a wholly erroneous estimate; and that it should be increased to RM20,000.

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[14] In 1966 in the case of *Mazlan bin Abu Bakar v. Hoh Kai Cheong* [1999] Mallal's Digest para 1225 the court awarded RM41,000 for intertrochentric fracture left femur, fracture of left tibia, left knee haemthrosis, 25cm scar of the left upper thigh, 1.5cm shortening and osteoarthritis of the left knee joint.

[15] In the case of *Saravanam a/l M. Ramasamy v. Muniyandi* [2003] 3 MLJ p. (iv) for compound fracture of the tibia and fibula with 2cm shortening a sum of RM45,000 was awarded. In the same case for laceration wound (7cm x 3cm) a sum of RM8,000 was given. On appeal by the defendant the Shah Alam High Court dismissed the appeal and affirmed the awards of the Sessions Court. In *Mustapha bin Kassim & Anor. v. Md. Akhir bin Ariffin* [2003] 3 MLJ p. (x) for fracture of tibia and fibula with 1cm shortening the court awarded RM50,000 and for fracture of tibia left leg with 0.5cm the court awarded RM22,000. The appeal to the High Court was struck off.

[16] In *Leong Yee Hoong v. Amuthamulan a/p Shanmugam & Anor.* [2003] 3 MLJ p (xii) for compound comminuted fracture of tibia & fibula with 1cm shortening the court awarded RM50,000. The appeal to the High Court by the defendant was dismissed and the award confirmed.

[17] We need to state in this case that nowhere in the judgment of the learned trial Sessions Court Judge had she considered the relevant factors in support of the plaintiff's claim as follows:

(1) that the plaintiff had a bone graft operation.

(2) that apart from stiff knee he also had stiffness of the ankle.

(3) that the plaintiff will have osteoarthritis of the knee joint and with this condition the pain and stiffness in the left knee is likely to increase.

(4) that the plate that was used to fix the fracture of the femur needs to be removed. This will also entail future pain and suffering.

[18] We also noted that both the learned trial Sessions Court Judge and the learned judge of the High Court had erred when they held the bench-mark of awards for fractures of the leg to be equated against a case of amputation. In the case of an amputation the pain and suffering is gone. The plaintiff is able to

use prothesis to move around and is also awarded a substantial sum for prothesis. On this point we would refer to the case of *Azman bin Kasri v. Md. Isa bin Endut & Govt. of Malaysia* [1988] 2 CLJ 743; [1988] 1 CLJ (Rep) 351 wherein the award in an amputation case includes the following:

RM12,000	for pain and suffering due to the nature of injuries to his (L) leg prior to amputation of the leg.
RM45,000	for amputation of the leg above knee (in assessing damages, the fact that the plaintiff had refused amputation was taken into consideration).
RM10,000	for skin grafting and resultant scar.
RM39,740	for loss of future earnings at RM240 per month for 24 years.
RM33,600	for cost of fitting artificial limb and for the fracture.
RM20,640	for cost of future removal of consumptive items.
RM10,500	for traveling expenses for servicing of artificial limb (3 trips per year at RM100 per trip for 35 years).

[19] Based on the case authorities set out as above we are of the view for the present injuries and disabilities the plaintiff should be entitled to an award of RM45,000. However, we would make a slight reasonable deduction of RM10,000 for the previous injuries sustained by the plaintiff. We would therefore increase the award for pain and suffering to the plaintiff in this case from RM28,000 to RM35,000.

Loss Of Earning Capacity

[20] We shall now deal with the issue on the claim of loss of earning capacity. It is to be noted arising from the said accident the plaintiff had the following disabilities:

(1) He has a 4cm shortening and walks with a limping gait.

(2) There is a wasting of the muscle of his left leg with associated weakness.

(3) There is marked stiffness of his left knee.

[21] The plaintiff is unable to squat as a result of the stiffness. All functions requiring squatting, like prayers and toilet purposes will be difficult. He will have difficulty in going up and down stairs and ladders. At the time of the accident the plaintiff was 23 years old and was working at Hicom Suzuki as an operator. He was earning about RM600 including overtime allowance.

[22] It is true as alleged by learned counsel for the defendant that the plaintiff is found to be able to cope with his injuries after the accident. In fact on his own admission he left the factory job and took on the job as an iron monger near his home at Taiping. However, this was because at that stage of time the crippling osteoarthritis had yet to set in. Once it sets in the plaintiff will then feel the full effects of his injury as he will have considerable pain and the stiffness will increase. The plaintiff had rightly not asked for loss of future earnings as at the date of the trial he had yet to suffer the full effect of the osteoarthritis. But there is clear medical evidence that the plaintiff will later develop osteoarthritis of the joint in which he will have to endure more pain and stiffness.

[23] The learned judge of the High Court on appeal did not allow the plaintiff's claim for loss of earning capacity wherein he was of the view that for all the disabilities the plaintiff has already been compensated for pain and suffering under the award of general damages. With respect to the learned judge's view, we find that the plaintiff is not only to be compensated for all the disabilities but also whether these disabilities will effect his earning capacity when osteoarthritis sets in and his pain and stiffness of the knee increases. Had the learned judge kept specially the deadly osteoarthritis in mind he would have considered making the award for loss of earning capacity which the learned trial Sessions Court Judge clearly failed.

[24] We do not dispute the learned judge's view that the plaintiff must show real or substantial risk and not merely a fanciful risk that he will lose his present employment at some time before the estimated end of his working life in order for him to raise the claim of loss of earning capacity. For the present case it is our considered view that if the plaintiff losses his present employment it would be difficult for him with the onset of osteoarthritis to get a similar job or a job with the same salary and this is not a fanciful risk. We find that the learned judge had erred in his failure

to consider this point. In the case of *Othman bin Ahmad v. Singapore Tradition Co. Ltd, (supra)* at p. 66 the Federal Court had this to say:

> Osteoarthritis seems to me to be a very important factor in this case and must be taken into consideration in assessing the future loss of earnings of the plaintiff. The plaintiff is already suffering from osteoarthritis which will get worse with time. There is a strong possibility that many years before the plaintiff reaches the retiring age (he is now only 28 years old) the pain in his left ankle and foot could be so crippling that he might not be able to work at all. The learned judge did not appear to have given sufficient weight to this very important factor." In *Krishnan & Anor. v. Chow Wing Khuan* [1987] 2 MLJ p. 691, the Federal Court also had this to say: "The question is whether we should award loss of earning capacity to the respondent. Medical evidence showed that the effect of the injury to the left side of his neck resulted in weakness and wasting of muscles of his left upper limb, ie, difficulty in moving the left shoulder joint and left elbow joint and not able to grip properly with his left hand. He will not be able to do any work that involves lifting heavy weights, working on scaffoldings and work that requires unrestricted use of both his upper limbs. In that condition, he might not be able to continue work as a tractor driver. However, he did work for about eight months in Sarawak and is still a tractor driver at the date of trial.
>
> It is probable that he may be able to drive the small type of tractor instead of the heavier type, eg, bulldozer, and that would be only for a certain period of time. In the circumstances, we are satisfied that there is substantial or real risk that he will be unable to carry on his work as a tractor driver but will get a less paid employment or source of earning because of the effect of the injuries sustained. We agree therefore that he should be awarded damages for loss of earning capacity instead of loss future earnings.

[25] Based on the injuries sustained by the plaintiff and by reference to the case authorities cited above we find that this is a fit and proper case for loss of earning capacity to be awarded to the plaintiff. We accordingly make an award of a sum of RM15,000 to the plaintiff as being fair and reasonable having regard to the nature of the plaintiff's work, the age of the plaintiff at the time of the accident and the likelihood that it would be difficult for him to get a similar job or a job with the same salary at some time before the estimated end of his working life.

[26] For the reasons above stated we would allow the plaintiff's appeal with costs here and in the court below. In allowing this appeal we therefore make an order increasing the award for pain and suffering to the plaintiff from RM28,000 to RM35,000. We also make an order awarding a sum of RM15,000 for loss of earning capacity to the plaintiff. The deposit in the plaintiff's appeal is to be refunded to the plaintiff.